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disagree with the courts' construction, but while we permit the system to perdure we cannot deny either their authority or their duty to construe. In the other case, the courts have gone out of their way to interfere with policies of legislation, and their authority to do so is of an exceedingly doubtful character. Fortunately, however, in spite of the frequency with which the courts make rhetorical excursion into the apparently irresistible realm of general principles, the actual practice of declaring statutes void upon this basis has not been nearly so extended as Professor Haines seems to imply, being in plain point of fact confined almost wholly to the establishment of the rule of law mentioned above, that the power of taxation may not be used for other than a public purpose.

HOWARD LEE MCBAIN.

The Validity of Rate Regulations, State and Federal. By ROBERT P. REEDER. Philadelphia, T. & J. W. Johnson.—1914; xv, 449 pp.

The three most important subjects treated in this book are "The Distribution of Governmental Powers," "The Due-Process Clause" and "Just Compensation." On the first of these subjects the author shows convincingly enough that when a statute is no more definite than to require a commission to establish "reasonable" rates, it confers legislative power upon that commission. His conclusion, however, by no means follows, that such a statute (the Interstate Commerce Act, for instance—section 48) is unconstitutional. The author himself recognizes (note 31, on pages 64–65) the insecure basis of the court-made rule that legislative power can not be delegated, and the inconsistency of the decisions under the doctrine. While the Supreme Court has not formally renounced its assertion of this rule, it has nevertheless often upheld delegations of power not a bit less "legislative" in character than the power of determining what rates are reasonable, upholding such delegations by the fiction that the power was not legislative. It is manifest that government could scarcely go on without this delegation of legislative power.

The chapters on the due-process clause are the best in the book. The author makes a keen analysis of the decisions of the Supreme Court and of the historical meaning of the words, coming to the conclusion that the court is wrong in thinking that the due-process clause of the Fourteenth Amendment gave it any jurisdiction over statutes passed by state legislatures. Legislatures are not properly restrained thereby, contends the

author, from so altering the law of the land that some persons may be deprived of life, liberty or property, for such deprivation would be in accordance with the altered law of the land and therefore *with* due process of law. The restraint is on the executive and judicial organs of state governments (sections 73, 82, 83). The provision applies not to the making, but "merely to the manner of enforcing" governmental commands (section 61).

The author's discussion may seem futile to those whose only interest in constitutional law is the advocate's practical interest of knowing what arguments are likely to prove effective with the court. But to students of political science, seeking enlightenment as to the beneficence of the practical workings of our system of judicial control over legislation, it is of great interest. It is especially illuminating in exposing the absurdity of the contention that when the Supreme Court declares legislation to be unconstitutional it is merely following the mandate given it by the people in their soberer moods when framing the Constitution and its amendments. It should also be of interest to those lawyers who anticipate that the Supreme Court may some day adopt the view that the Constitution requires the judges to hold a statute valid if in their judgment it is not inconsistent with the Constitution, even though it is inconsistent with some prior judicial interpretation. So long as the court clings to the doctrine of *stare decisis* in deciding questions of constitutionality, it must disregard its own views of the meaning of the Constitution whenever those views are not in harmony with the precedents. Thus, through the use of *stare decisis*, the precedents, however erroneous they may now seem, have displaced the Constitution as the standard to be followed. It can at present be restored to supremacy only through the cumbersome process of amendment which can be blocked by one-fourth of the states, and those, the least populous. The supremacy of the Constitution could be restored by the court itself, whenever convinced of the error of a previous judicial interpretation, if it would confine the doctrine of *stare decisis* to branches of the law where its application does not involve disobedience to the court's own more recent understanding of the Constitution. As soon as the court chooses thus to obey the Constitution, in the light of its own best judgment as to the meaning of the instrument, discussions such as Mr. Reeder's on the correct interpretation of the due-process clause will no longer seem to lawyers "impractical" because at variance with the precedents.

For the purposes of the chapter on "Just Compensation" the author accepts the proposition that the federal courts have jurisdiction to consider the merits of state legislation which may be confiscatory, a juris-

diction conferred either by the due-process clause or perhaps with "far more propriety" (section 146) by the equal-protection clause of the Fourteenth Amendment. To this latter clause he devotes a brief separate chapter. He then discusses what constitutes just compensation. The company should be left with some return (at what rate he discusses later) on the value of its property at the time of the service rendered (section 155). The argument for this basis is as follows :

If the government appropriated that property the extent of its duty would be to pay for the value which the property possessed at the time of the appropriation ; and in deciding whether a rate regulation is an appropriation *pro tanto* the value of the property certainly ought to be estimated upon the same basis [section 156].

If this means anything, it means that any uncompensated appropriation, reasonable or unreasonable, is invalid, that the rate of return which must be allowed is the rate sufficient to keep the market value where it is, and that any governmental action making it worth less to its owner is an uncompensated appropriation. Inasmuch as any reduction of net earnings makes the property worth less to its owner, it follows that any reduction of net earnings would be unconstitutional. But neither the Supreme Court nor Mr. Reeder accepts this conclusion. Mr. Reeder tries to escape by saying that the "value" which he has in mind can not in any way depend upon earning capacity (section 162), and that it "seems to be the cost of producing at the present time property which is its equal in efficiency," minus depreciation, unused property etc. (section 157). The difficulty with this solution is that if a reduction of net earnings to the point where they yield "the constitutional rate of return" (section 179) on this "cost of producing, etc.," is permissible, we cannot forbid a further reduction *solely on the ground that it constitutes an appropriation of property*; for the permissible sort of reduction is likewise an "appropriation." If the further reduction is unconstitutional it must be because it is that particular sort of appropriation of property which seems to the court "unreasonable" or "unjust." If the unreasonableness or injustice of the reduction constitutes the criterion, the Supreme Court in passing upon the validity of rate regulations is performing the legislative function of determining a policy. To convince one of the soundness of the basis which it adopts, it must use arguments of public policy or of justice ; which neither it nor the author of this book attempts to do. That is why the discussions of both author and court are confused and unsatisfactory.

It does not help to say that the company's right to a reasonable re-

turn is dependent on the right of the public to be served at a rate no higher than the value of the services, as the author (following some dicta of the Supreme Court) suggests in section 177. If by "value of the services" is meant the utility to individual users, there will always be some to whom the services will not be worth the price asked, however low it may be, and they will not buy; there will be others to whom the services will be worth more than they have to pay; and it would be absurd to look for the utility of the services to the "average" purchaser. If on the other hand "value of services" is used in the sense of exchange value, then the price cannot in the nature of things exceed the value, for if a high price is asked (and obtained) it must be because the supply is sufficiently limited to give the service a value equal to that price. This does not justify any price which the company may fix, for the essence of the complaint of extortion against unregulated monopolies is that they have the power to limit supply and thus to increase exchange value and the price of their products or services; and this complaint is not answered by saying that the price is no higher than the exchange value.

The author's discussion of "Just Compensation" gives a fairly accurate idea of the course of the decisions of the Supreme Court, though it is difficult to be accurate in describing anything so vague and shifting as the views of the court on this question. It is doubtful whether the Supreme Court is so definitely committed to the cost-of-reproduction-less-depreciation theory as is the author; for it still quotes in its decisions the well-known statement of Justice Harlan in *Smyth v. Ames*, 169 U. S., 466, 546 (criticized by the author in section 168), to the effect that several things besides "the present as compared with the original cost of construction" are "matters for consideration, and are to be given such weight as may be just and right in each case." This leaves a convenient loop-hole for escape whenever the results of the application of the cost-of-reproduction-less-depreciation rule may seem too unpleasant.

In addition to the chapters already commented upon, there are also chapters on "The Commerce Clause", "The Impairment of Contracts," "Preferences to Ports," and "Limitations upon Federal Judicial Power." But the author's real contribution is his admirable discussion of the due-process clause. It is to be regretted that he did not devote equally satisfactory consideration to the question of the reasonableness of the return.

ROBERT L. HALE.